

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 29TH DAY OF JULY 2003

PRESENT

THE HON'BLE MR.JUSTICE M.F. SALDANHA

AND

THE HON'BLE MR.JUSTICE N.K. PATIL

CRIMINAL PETITION 619/02 C/W.Cr.P.2798/02 & 2799/02

1. CRIMINAL PETITION 619/02:-

BETWEEN

Sri Yamanappa Sangappa Hulageri
(Wrongly shown as Yamanappa
Sakrappa Hulageri, in the complaint)
age: major, Occ: agricultural
r/of.Alampur Pet, Ilkal
Taluka; Hungund, Dist. Bagalkot PETITIONER

(By Sri S.B. Hebballi, Adv.)

AND

Sri Kallappa Salabappa Ganganagoudar
major, Occ: agriculture & business
r/of.Nidagundi, Taluk: Ron, Dist.Dharwad

RESPONDENT

(By Sri S. Mahesh for Sri R.B. Deshpande, Adv.)

2. CRIMINAL PETITION 2798/02:-

1) Smt.T. Lakshmi, W/of.
Thirumalachar
No.56, "Sreerangadhama"
Govindappa Road
Basavanagudi
Bangalore - 04 Petitioners contd..

2) Sri K.T. Srinivas
S/of.late Thirumalachar
No.56, "Sreerangadhama"
Govindappa Road
Basavanagudi
Bangalore - 04

PETITIONERS

(By Sri Dayanand S. Patil & Sri R.G. Bhat, Advs.
for Petrs. in both Cr.P.2798/02 & 2799/02)

AND

S.C. Sanjaykumar
s/of.Chakravarthy
No.492/4, 2nd Cross
7th Block, Jayanagar,
Bangalore - 82.

RESPONDENT

3. CRIMINAL PETITION 2799/02:-

Petitioners common vide Cr.P.2798/02

AND

Sri S.H. Chakravarthy
s/of.late Honnaiah Shetty
No.492/4, 7th Cross
7th Block, Jayanagar
Bangalore - 82.

RESPONDENT

Criminal Petitions are filed under S.482
Cr.P.C. by the Advocate for the Petitioners
praying that this Court be pleased to quash the
entire proceedings in CC.No.58/01 (PC No.42/02),
on the file of the J.M.F.C., Ron, CC.No.34205/02
and CC.No.35581/01 on the file of the XVI Addl.
C.M.M., Bangalore etc.

Criminal Petitions coming on for dictating
judgment, SA^LDANHA J. delivered the following:-

COMMON JUDGMENT..

COMMON JUDGMENT

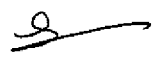
Criminal Petition 619/02 has been referred to the Division Bench for purposes of resolving the law with regard to the question as to whether, in the case of a private complaint instituted before the learned Magistrate, the requirement of setting out the list of witnesses on whom the complainant proposes to place reliance is mandatory and secondly, as to whether in the event of the complainant not setting out the list of witnesses the breach is fatal as to require the dismissal of the complaint on the ground that the mandatory requirements of law have not been complied with. The entire debate has virtually emanated because of the provisions of S.204 Cr.P.C. which ^{are} is reproduced below:-

"204: Issue of Process:-

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.



(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section(1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.

Special emphasis has been laid on sub-clause (2) of S.204 which mandates that no summons or warrant shall be issued because the contention raised before the learned Single Judge was to the effect that the filing of the list of witnesses is not optional but that it is compulsory or rather mandatory and that ipso facto if the complaint is presented without the list of witnesses having been disclosed that the Court ought not to issue ^{the} summons or warrant. The real complication has arisen because of the fact that obviously overlooking this provision, process has been issued in a few cases and after the accused has appeared, the contention raised is that the issuance of process is bad in law and that



consequently, the complaint should be dismissed. One of the contentions raised on behalf of the complainants is to the effect that under Chapter 35 of the Cr.P.C. provision has been made for irregularities which do or do not vitiate the proceedings and that consequently, if the list of witnesses has not been furnished earlier that it is open to the Court to direct the filing of ^{the} list of witnesses even after the accused has appeared because the defect is rectifiable/curable or is capable of being regularly ^{used} raised. The obvious argument in favour of this plea proceeds on the footing that the accused ~~also~~ must be put on notice with regard to the persons who ~~must be~~ ~~put on~~ ~~notice~~ ~~with~~ ~~regard~~ ~~to~~ ~~the~~ ~~persons~~ ~~who~~ ~~are~~ ~~likely~~ ~~to~~ ~~depose~~ ~~against~~ ~~him~~ ~~in~~ ~~the~~ ~~criminal~~ ~~case~~ ~~or~~ ~~in~~ ~~other~~ ~~words~~, that the rule of fairness requires that the accused be aware of what the prosecution proposes to allege against the accused and that in the absence thereof, the accused is unfairly handicapped and that the law cannot condone such a situation. Again, we need to take note of the fact that at the stage of issuing process it is open to the learned Magistrate to examine not only the complaint but ^{the} additional evidence, but in any

event, the proceeding is ex parte and the accused is no where in the picture. Where the Court has arrived at a prima facie satisfaction that a case has been made out and process is issued, the accused is still a long way from entering a defence and dealing with the allegations and therefore, the plea canvassed is that even if ^{the} list of witnesses has not been disclosed up to that point of time, the moment the grievance is made the Court will undoubtedly order the complainant to furnish the list of witnesses and the unfair handicap in the way of the accused is immediately ~~removed~~ ^{demolished} from this point of view. Therefore, the two differing views that have emerged are as indicated by us earlier that since the sub-section uses the word 'shall' that if the process is issued without the list of witnesses being disclosed, the issuance of process is liable to be quashed and ipso facto the complaint cannot survive whereas the opposite point of view is that this impediment is rectifiable and if that is so, that there is really no need or no sanction for the dismissal of the complaint even if one has to technically stick to the letter of the law. This

extreme view would postulate that if the issuance of summons was bad that the Court would have to go back to that stage, pass fresh orders and proceed from there onwards. Our attention was invited to an earlier decision of this Court reported in ILR 2002 KAR 181 (FAKIRAPPA .vs. SHIDDALINGAPPA & ANOTHER) wherein a learned Single Judge of this Court (PATRI BASAVANA GOUD, J) upheld the view originally propounded in 1987(2) K.L.J. 36 (KESHAHA MURTHY H.L. & ANOTHER .vs. H. VEERAIHA) wherein the learned Judge held that S.204-2 Cr.P.C. is mandatory in nature commanding absolute compliance. Though the learned Single Judge has referred to a later decision of this Court reported in I.L.R. 2000 KAR 3881 in the case of T.M. JAKKANNA @ TIPPANNA MALLAPPA JAKKANNAVAR & ANOTHER .vs. M/S. RAJALAXMI TRADERS wherein the Court held that the defect is curable under S.465 Cr.P.C. which view did not find favour with the learned Single Judge. What is of significance is the fact that though the learned Single Judge took this view, in the operative part of his judgment he has held that the action of the learned Magistrate in issuing processes without the list of witnesses is all ^{can} ~~is~~ that ~~being~~ struck

down, that consequently the complaint survives, the conclusion of the Court that a prima facie case requiring the issuance of process was also retained intact and ^{the} only direction was that the Court would have to go back to that stage, pass fresh orders and proceed from there onwards.

2. It is essentially, in this background that we ~~we~~ are required to reconcile the legal position or rather, to lay down very clearly as to what the correct course of action would be. In the first instance, the learned Advocates who have advanced their submissions before us are right when they point out that under the provisions of *Sec. 204(2)* the filing of the list of witnesses is essential and in one of the decisions referred to above the learned Judge has even clarified the position that the case being one under S.138 of the Negotiable Instruments Act and where the ^{only} witness is the complainant, that it is equally necessary for the complainant to file a memo stating that the complainant is the only witness and that there are no other witnesses. There can be no two opinions about the fact that even though in a private complaint unlike in a case instituted

on a police charge sheet, the accused does not have the benefit of the witness statements, in other words, knowing ~~why~~ precisely as to what is the evidence that is going to be used against the accused, but at the same time, the law makes it obligatory for the complainant to at least disclose the names of the witnesses so that the accused in relation to the contents or averments in the complaint will be able to correlate as to what precisely is the role of these witnesses and gauge as to what is the nature of the evidence that will have to be dealt with. We do agree that there are instances wherein the breach of a mandatory provision would affect the very basis of the proceeding and that consequently, where an application for quashing is made before the High Court that inevitably the proceeding will have to be quashed. There are instances such as those set out in Chapter 35 of the Cr.P.C. wherein the breaches are rectified^{able}. This has obviously been provided for in order to ensure that there is no wastage of judicial time and furthermore, that the complainant is not put to avoidable wastage of time and resources ^{by} ~~for~~ having to ^{se} ~~to~~ institute the

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proceeding if it can be corrected and saved. The entire debate has emanated because Ss. 460 and 461 Cr.P.C. set out a number of situations which vitiate and do not vitiate ^{a proceeding but} ~~the~~ the present state of affairs does not figure there. That is why the issue is required to be independently decidable.

3. We have already dealt with the intended or possible prejudice aspect to the accused which is the genesis for making it compulsory to disclose the list of witnesses. Normally, where there is compliance with the provisions of S.204-2, the accused will receive the copy of the complaint along with the summons or warrant and therefore be fully posted of the case made out and the witnesses who are going to depose in favour of the prosecution. The short question that we need to examine is as to whether any prejudice is caused to the accused at this point of time if the list of witnesses is not disclosed and in our considered view, the answer to that question is in the negative for the simple reason that process only enforces the presence of the accused before the Court and the accused still has an adequate opportunity of dealing with the case because the

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complainant's evidence is yet to be led and, well before that stage the list of witnesses is bound to be disclosed as soon as the error comes to the notice of the Court. Consequently, in our considered view, there is no justification for the plea that the non-filing of the list of witnesses will render the proceeding ab initio void or that this infirmity would ipso facto justify an order for quashing of the proceedings. We accept the position that the error is rectifiable as is essentially the view that has been enunciated in the majority of decisions.

4. The last question is as to what would be the correct procedure that the Court is required to follow in instances of the present type. Firstly, since the complainant is at fault the Court would be fully justified in directing the complainant to forthwith file the list of witnesses and if there is any further default, the Court would be justified in dismissing the complaint for non-compliance with ^{the} statutory provisions. If the list of witnesses is filed, the correct procedure for the Court would be to take the proceeding back to the pre-process stage,



to pass a fresh order as though process was being issued in the first instance and proceed from that point onwards.

5. Though it may seem academic, the learned Counsel who have argued for the different parties before us have brought ~~it~~ to our notice one more situation which is most likely to occur before the trial Court. All this time we had proceeded on the assumption that the proceeding is before the High Court in a proceeding under S.482 Cr.P.C. praying for quashing of the case on the ground of statutory non-compliance and in these situations it is perfectly permissible for the High Court within the framework of the law to direct corrective action along the lines indicated by us. What the learned Counsel have brought to our notice is that in the majority of cases where the breach has taken place, the aggrieved party namely the accused may not ~~have~~ come all the way up to the High Court through a petition for quashing but may apply to the trial Court itself pointing out the statutory non-compliance and pray for dismissal of the complaint on this ground and if the correct position in law as indicated by us is

that the complaint ought not to be dismissed but that corrective action be taken, the procedural difficulty may arise for the learned Magistrate who raises the question as to whether the trial Court is competent to review the earlier order issuing process. This is an angle which one of the learned Counsel have raised and in our considered view very rightly because he points out that the trial Magistrates are not invested with inherent powers and that therefore there is required to be sanction for whatever course of action the ^{trial} Court embarks on. We do concede that unlike S.151 C.P.C. that there is no corresponding provision in the Cr.P.C. which invests the trial Court ^{with powers} to pass appropriate orders in the interest of justice in relation to situations for which there is no other expressed provision and that consequently, the trial Courts may come up against a procedural obstacle. The answer to that is that in passing a fresh order for process ^{after} directing the complainant to file the list of witnesses that the trial Court has not either reviewed the earlier order or overridden ^{den} it but the trial Court is proceeding on the position in

law that we have now clarified namely, that the earlier order issuing process being an order in breach of the statutory provision is really an order that is nonest, it is of no consequence and is therefore effectively non-existent and in this view of the matter it is perfectly competent for the trial Court to take corrective action.

6. In the light of the legal position as clarified by us, Criminal Petition 619/02 stands disposed of with the direction that the trial Court follows the law as laid down by us in this decision . We also direct ^{ed} the office to list similar petitions namely, Criminal Petition Nos.2798/02 and 2799/02 along with the originally referred petition and as indicated by us earlier, we have heard the learned Counsel representing the parties in these proceedings also and we direct that these two petitions stand disposed of with a direction to the trial Court to proceed in consonance with the law as now clarified in this judgment.

7. The Reference is answered accordingly.

GS/-

Sd/-
Judge

Sd/-
Judge